2-18-2016

Marek v. Hecla, Ltd Respondent's Brief Dckt. 43269

IN THE SUPREME COURT OF THE STATE OF IDAHO

PATRICIA MAREK, an Idaho Resident, individually and as a personal representative of the ESTATE OF LARRY "PETE" MAREK; MICHAEL MAREK, an Idaho resident; JODIE MAREK, an Idaho resident; and HAYLEY MAREK, a Washington resident,

Plaintiffs-Appellants,

v.

HECLA LIMITED, a Delaware corporation, HECLA MINING COMPANY, a Delaware corporation; SILVER HUNTER MINING COMPANY, a Delaware corporation; PHILLIP S. BAKER, JR. ("Baker"), an Idaho resident; JOHN JORDAN, an Idaho resident; DOUG BAYER, an Idaho resident; RON KRUSEMARK, an Idaho resident; SCOTT HOGAMIER, an Idaho resident; CINDY MOORE, an Idaho resident; DALE STEPRO, an Idaho resident, DOES 1-10; and XYZ INC. 1-10

Defendants-Respondents.

Supreme Court Docket No. 43269

RESPONDENTS' BRIEF

Appeal from the District Court of the
First Judicial District for Kootenai County

Honorable Benjamin R. Simpson, District Judge, Presiding

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I. STATEMENT OF THE CASE

A. Nature of Case

On April 15, 2011, an accident occurred at the Lucky Friday mine, in Idaho's Silver Valley, when the ceiling in one of the mining areas collapsed. At the time of the accident, two miners, Pete Marek and Mike Marek, were in the mining area, which is called a "stope." The two miners had not been directed to work in the stope at that time—indeed, they were assigned to be elsewhere in the mine—but had gone there on their own. When the ceiling collapsed, Pete Marek and Mike Marek were injured, with Pete's injuries proving fatal. This lawsuit seeks tort damages on their behalf, and on behalf of their families, against Hecla Limited—which owns the Lucky Friday mine and employed the Mareks—as well as certain affiliated corporations and certain Hecla managers.

However, Pete and Mike Marek were employees who were injured on the job. The worker's compensation system is the exclusive remedy for such injuries, unless the actions that caused the injuries satisfy a narrow exception to the rule. Specifically, the worker's compensation law provides that employees are exempted from the exclusive-remedy rule only if the actions that injured them were "wilful or unprovoked physical aggression." Idaho Code § 72-209(3). This Court has addressed the scope of this language twice, and held both times that employees may file claims in court *only* when the employer or its agents had "an intention to injure the employee." *Kearney v. Denker*, 114 Idaho 755 (1988); *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176 (1990).

No one contends that any Defendant intended to injure Pete or Mike Marek. Plaintiffs make no such argument, and neither did the U.S. Mine Safety & Health Administration (MSHA), Hecla's chief regulator. So, unable to prevail under this Court's precedent, Plaintiffs attempt to reinterpret it,

to broaden the exception to the worker's compensation exclusivity rule, so that plaintiffs who allege recklessness or gross negligence can sue their employers in court, *in addition* to receiving worker's compensation benefits.

The Court should reject Plaintiffs' inaccurate reading of precedent. The worker's compensation law is clear as to the conduct required before an employee can bring a lawsuit for work injuries, and this Court's precedent interpreting the statute is equally clear—and has been settled for decades. Idaho's rule is also consistent with the vast majority of other states, which have adopted the same rule. Expanding the claims that can be brought in court would undermine the compromise crafted by the Legislature in the worker's compensation law—a compromise that gives employees swift and certain compensation regardless of fault, but also gives employers some certainty and lower litigation costs. If claims of recklessness or gross negligence for workplace injuries are permitted in court, that compromise would be disrupted, and the Legislature's intent thwarted.

Thus, this Court should affirm the district court's summary judgment for Defendants. The exception to the worker's compensation exclusivity rule is clearly defined, and there is no question that Plaintiffs do not and cannot satisfy it.

B. Procedural History

Plaintiffs filed this lawsuit on April 12, 2013. (R. 11-29) Defendants answered the complaint, stating as an affirmative defense that the worker's compensation law is the exclusive remedy for Plaintiffs' claims. (R. 42-53) On February 10, 2015, after discovery, Plaintiffs moved for summary judgment on the exclusivity question. On February 23, 2015, Defendants cross-moved for summary judgment on the same question. On April 21, 2015, the district court, the Honorable Benjamin

Simpson presiding, granted Defendants' motion for summary judgment and denied Plaintiffs'. (R. 977-986; R. 979(a) and (b))[1]

In a written decision, the district court explained that "[g]enerally, the Idaho worker's compensation law provides the exclusive remedy for injuries arising out of and in the course of employment." (R. 979(a), citing *Kearney*, 114 Idaho at 757) The only exception, the court continued, is where the injury is caused by "wilful or unprovoked physical aggression." (*Id.*, quoting Idaho Code § 72-209(c)) Applying this Court's decisions in *Kearney* and *DeMoss*, the district court held that Plaintiffs' allegations of recklessness were insufficient: "In the case at bar, there are no allegations that Defendants acted with any subjective intent to harm Pete and/or Mike Marek, nor are there any allegations that Defendants believed that harm was substantially certain to occur." (R. 981) As a result, the court held that Plaintiffs' exclusive remedy was the worker's compensation law, and so their lawsuit was barred. (R. 985-86) The district court entered final judgment on May 5, 2015. (R. 988-89) Plaintiffs timely filed a notice of appeal on May 22, 2015. (R. 990-94)

On April 29, 2015, before the court entered final judgment, Plaintiffs filed a document captioned "motion for reconsideration." (R. Adden. 14-16) However, that "motion" simply stated that Plaintiffs sought reconsideration of the district court's decision. (*Id.*) It offered no argument or explanation whatsoever. (*Id.*) Plaintiffs did not file a brief in support of their motion to reconsider

[1] The original Record inadvertently omitted two pages from the district court's decision, so those pages were numbered R. 979(a) and R. 979(b).

until August 4, 2015—*three months* after the court entered final judgment. (R. Adden. 40-48) The court denied the motion on September 1, 2015. (R. Adden. 90-91)

C. Statement of Facts

The Lucky Friday mine is one of the deepest underground silver mines in the United States, with its primary shaft descending one mile below the surface. (R. 14, ¶ 21) The mine is located near Mullan, Idaho, in the Silver Valley, and is owned and operated by Hecla and its affiliated companies. (*Id.* ¶ 20) The primary method of mining at the Lucky Friday is the "underhand" method, whereby the rock and mineral at each level is mined, and then replaced with a mixture of sand and cement. (R. 773 (Bayer Decl.))[2] After that, the level immediately below it is mined and replaced with sand and cement, and so on, as the miners follow the mineral vein downward. (*Id.* at 772-73) This method has been used at the Lucky Friday for years. (R. 114-15, ll. 23:16-24:4 (Dep. Tr. of T. Ruff))

In April 2011, one of the active stopes at the Lucky Friday mine was the 6150-15-3 stope.[3] At that particular stope, two mineral veins were coming together as they descended downward. (R. 773 (Bayer Decl.)) In the levels above 6150-15-3, the veins were still far enough apart to mine each vein separately, leaving a keystone-shaped "pillar" of unmined rock between them. (*Id.* at 773, 775) However, at 6150-15-3, the veins were close enough together that leaving a pillar between them was

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[2] Doug Bayer was Mine Superintendent at the Lucky Friday Mine in 2011. (R. 772 (Bayer Decl.)) He has a degree in Mining Engineering, and was Chief Engineer at the Lucky Friday Mine before becoming Mine Superintendent. (*Id.*)

[3] A "stope" is a horizontal "cut" that the miners make into a mineral deposit.

no longer possible. (R. 781 (Decl. of J. Jordan))[4] As a result, a mining plan was developed to mine both veins together, without a pillar between. (*Id.*) Because the Lucky Friday uses the underhand method, that meant that the ceiling above 6150-15-3 had already been mined and contained a pillar. (*Id.* at 781-82)

The mining plan was reviewed and approved by Doug Bayer, the mine's Superintendent. (R. 774 (Bayer Decl.); R. 495, ll. 9:8-16 (Bayer Dep.); App. Brief 28) It was also reviewed by John Jordan, the mine's General Manager. (R. 780-81 (Jordan Decl.)) Both Bayer and Jordan are mining engineers, and both served previously as the mine's Chief Mining Engineer. (R. 772 (Bayer Decl.); R. 780 (Jordan Decl.)) Bayer concluded that the mining plan was safe, because the rock at the Lucky Friday mine experiences horizontal pressure—that is, pressure pushing in from the sides—50% greater than the vertical pressure, which would push against the keystone-shaped pillar above 6150-15-3 and support it. (R. 775 (Bayer Decl.); *see also* R. 678, ll. 107:12-15 (Dep. Tr. of T. DeVoe[5]) ("So the Gold Hunter [vein in the mine] is remarkably less seismically active, and that clamping pressure we talk about from horizontal orientation is very effectual and again why I wasn't concerned about the pillar.")) Jordan likewise did not believe the plan was unsafe. (R. 782 (Jordan Decl.)) This method had been successfully used before at the mine. (R. 775-76 (Bayer Decl.))[6]

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[4] John Jordan was the General Manager of the Lucky Friday Mine in 2011. (R. 780 (Jordan Decl.)) He has a degree in Mining Engineering, and was Mine Superintendent and Chief Engineer at the Lucky Friday Mine before becoming General Manager. (*Id.*)

[5] Terry DeVoe has been the Chief Geologist at the Lucky Friday mine since 2008. (R. 653, ll. 7:18-24 (Dep. Tr. of T. DeVoe))

[6] Plaintiffs assert that the length of the "cut" at the 6150-15-3 stope was "for a distance greater than had ever been done before at the mine," citing the testimony of John Lund and Doug Bayer.

On April 15, 2011, Hecla employees Pete and Mike Marek began their shifts at the Lucky Friday mine. (R. 15, ¶ 29) Both Pete and Mike were experienced miners, each with more than 25 years of mining experience, and with seven or more years specifically at the Lucky Friday. (R. 14, ¶¶ 23-26) Although both Mareks worked in the 6150-15-3 stope when there was mining being conducted there, they were not assigned there on April 15, 2011 because the stope was "muck bound," meaning the rock excavated by the previous shift had not been removed from the work area and therefore no further mining could be done until the rock was cleared (which would not be accomplished before the end of their shift that day). (R. 791-92 (Dep. Tr. of D. Stepro)) As a result, Hecla assigned the Mareks on April 15 to the spray chamber on the 6150 level, which was outside the 6150-15-3 stope. (R. 791 (Stepro Dep.); *see also* R. 978 n.2 (Dist. Ct. Order) ("It is undisputed by the parties that Mike and Pete were not assigned to work in the 6150-15-3 stope.")) However, the Mareks decided on their own to spend time at the 6150-15-3 stope, to water down the "muck." (R. 15, ¶ 34; *see also* R. 978 n.2 ("they were assigned to work on the spray chamber in the 6150 slot and chose to water down the muck in the 6150-15-3 stope.")) To be clear, this was not a violation of policy—so long as miners complete their assigned work during their shift, they have discretion as to whether to spend time on other activities, or do nothing at all, for the balance of their shift—but they were not directed or expected by anyone to take any action beyond working on the spray chamber. (R. 791-92 (Stepro Dep.); R. 978 n.2 (Dist. Ct. Order))

(App. Brief 6, citing R. 717-18, ll. 13:18-14:13 and R. 500, ll. 26:24-28:4) Neither passage supports the assertion, as both witnesses testified such a length had been done successfully in the past. (R. 717-18, ll. 13:18-14:13 and R. 500, ll. 26:24-28:4)

While the Mareks were in the 6150-15-3 stope, with Pete on the west side of the stope and Mike on the east side, the ceiling of the west side of the stope collapsed. (R. 15-16, ¶ 38) Pete Marek was fatally injured in the collapse. (R. 16, ¶ 41) Mike Marek alleges he suffered injuries. (R. 21, ¶ 71)

Following the accident, MSHA cited Hecla for "fail[ing] to adequately examine and test the ground conditions to determine if additional measures needed to be taken" to support the pillar above the stope. (R. 17, ¶ 50) MSHA characterized Hecla's conduct as "more than ordinary negligence." (*Id.*) However, it did not conclude the conduct was willful or intentional. Hecla appealed the citation. On appeal, the reviewing MSHA administrative law judge upheld certain of the citations (and vacated others), but explained that "I do not believe that Hecla intentionally risked the lives of miners." (App. Brief 11)

II. STANDARD OF REVIEW

"In an appeal from an order of summary judgment, this Court's standard of review is the same as the standard used by the trial court in ruling on a motion for summary judgment." *Estate of Becker v. Callahan*, 140 Idaho 522, 525 (2004). In the trial court, "[s]ummary judgment is appropriate if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Id.* "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which [the] Court exercises free review." *Id.*

Similarly, "when the district court grants summary judgment and then denies a motion for reconsideration, this Court must determine whether the evidence presented a genuine issue of material

fact to defeat summary judgment. This means the Court reviews the district court's denial of a motion for reconsideration de novo." *Massey v. Conagra Foods, Inc.*, 156 Idaho 476, 480 (2014) (internal quotation marks omitted).

III. ARGUMENT

A. The District Court Properly Determined That Plaintiffs' Claims Are Barred Because The Worker's Compensation Law Is Their Exclusive Remedy.

The district court correctly held that Plaintiffs' claims are barred by the worker's compensation law. That law provides that "the liability of the employer under this law shall be exclusive and in place of all other liability of the employer to the employee, his spouse, dependents, heirs, legal representatives or assigns." Idaho Code § 72-209(1). Thus, for nearly all claims of injuries at work, an employee cannot bring suit, but has recourse only to the worker's compensation system (the "Exclusivity Rule"). The statute contains a narrow exception: If the injury was caused by the "wilful or unprovoked physical aggression" of the employer or its agents, then the worker's compensation law is not the exclusive recourse for the employee, and he or she can bring both a worker's compensation claim and a lawsuit. Idaho Code § 72-209(3).

1. This Court's Decisions In *Kearney* And *DeMoss* Preclude Plaintiffs' Claims.

This Court has twice addressed the scope of the exception to the Exclusivity Rule. In each case, the Court held that "wilful or unprovoked physical aggression" means conduct intended to injure.

First, in *Kearney v. Denker*, 114 Idaho 755 (1988), the Court reviewed a case brought by an employee who was injured while working as a landscaper when her right foot was partially severed

by the lawn mower she was operating. *Id.* at 756. She sued in court, arguing that her claim was for "wilful or unprovoked physical aggression," and so fell within the exception to the Exclusivity Rule. *Id.* at 756-57. Specifically, the employee argued that her employer did not install "a safety device and a grip that would shut off the engine when the operator's hands came off the handlebars," which "were included in the parts shipped with the chassis," and also that the employer "did not install a grass deflector that was shipped with the chassis," which "would have covered an opening at the rear of the lawn mower that exposed the rotary blade and the cutting area." *Id.* The employee claimed that the employer was "willfully, wantonly and grossly negligent, which negligence was so extreme as to be substantially certain to injure someone." *Id.*[7]

This Court held that the employee's exclusive recourse was the worker's compensation law. It explained that "[t]he word 'aggression'" in the statute "connotes 'an offensive action' such as an 'overt hostile attack.'" *Kearney*, 114 Idaho at 757. Thus, to invoke the exception, an employee must have "evidence of some offensive action or hostile attack." *Id.* The Court held further that "[i]t is not sufficient to prove that the alleged aggressor committed negligent acts," *even if* those acts "made it *substantially certain* that injury would occur." *Id.* (emphasis added). Applying this principle, the Court explained that "[t]here was no evidence presented to the trial court in this case that the employer wilfully or without provocation physically and offensively or hostilely attacked the employee." *Id.* Consequently, "the trial court was justified in granting summary judgment against the employee." *Id.*

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[7] Plaintiffs argue that *Kearney* involved "merely simple negligence." (App. Brief 19) As the discussion above makes clear, that is inaccurate. Rather, the plaintiff there contended that her allegations were for willful conduct.

at 758. Eliminating any uncertainty, the Court summed up, explaining that the exception to the Exclusivity Rule "require[s] an intention to injure the employee." *Id.* It affirmed summary judgment for the defendants. *Id.*

The Court took up the exception to the Exclusivity Rule again in *DeMoss v. City of Coeur d'Alene*, 118 Idaho 176 (1990). There, four employees sued their employer, which had ordered them to cut up a boiler so that it could be removed from a community center. *Id.* at 176-77. One of the employees had told the foreman assigned to the project that he suspected the boiler contained asbestos insulation. *Id.* at 177. No effort was taken by the foreman to investigate that suspicion. *Id.* Instead, the foreman forged ahead and ordered the employees to remove the insulation material from the boiler. *Id.* He told the employees that "nobody knew for sure what the material was and that there was a minimal risk." *Id.* Later, the employer tested the insulation, and it did contain asbestos. *Id.* Even so, a supervisor aware of the test results told the foreman that the material "was harmless, and that no hazard would be presented by its removal." *Id.* The foreman again ordered the employees to work with the insulation. *Id.* Only later did the employees find out they had been working with dangerous asbestos. *Id.* In their lawsuit, they argued that the defendants "knew the material they required the appellants to remove was asbestos; that the defendants 'lied' to the appellants by not telling them it was asbestos; and that the defendants failed to provide adequate protective gear to the appellants, all of which was tantamount to an 'offensive action or hostile attack.'" *Id.* at 178.

This Court disagreed. It explained that "the plaintiffs all acknowledged that they had no reason to believe any of the defendants harbored ill feelings toward them or wanted to cause them injury in any manner." *DeMoss*, 118 Idaho at 179. Further, although an employee had indicated that

the insulation *might* contain asbestos, "[t]he record does not show that [the foreman] or any of the defendants actually knew that it was asbestos until the test results from the laboratory were received." *Id.* Finally, the Court explained, although the employer still sent the employees to work with the asbestos after it received the test results, it did give them some protective clothing. And, "while the protective clothing provided to the workers prior to the second round of removal may indeed have been inadequate, that does not rise to the level of 'unprovoked physical aggression.'" *Id.* Consequently, citing to *Kearney*, the Court held that "[t]he plaintiffs have not proved any 'wilful or unprovoked physical aggression' as required in I.C. § 72-209(3), and thus the plaintiffs' state tort claims were preempted by the Worker's Compensation Act." *Id.* And the Court further held: "To reiterate what we said in *Kearney v. Denker*, 'It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur.'" *Id.* It affirmed summary judgment for the defendants. *Id.*

Kearney and *DeMoss* are dispositive of Plaintiffs' claims here, for Plaintiffs have submitted no evidence whatsoever of any intent to injure. Thus, as in *Kearney*, even if Defendants' actions made it substantially certain that injury would occur by implementing the mining plan for stope 6150-15-3—which, to be clear, Defendants do not concede[8]—that would not be enough. And, as in *DeMoss*, even if Defendants knew the stope might be unsafe—which, again, Defendants do not concede—that

[8] For instance, Doug Bayer, the Mine Superintendent, swore in his declaration that he "personally visited the stope" on April 13, 2011—only two days before the accident. (R. 777 (Bayer Decl.)) No evidence conflicts with Bayer's sworn statement. If Bayer knew the stope was unsafe, as Plaintiffs contend, there is no explanation for why he would have put himself in harm's way by going to the very spot where he knew there would be an imminent collapse.

is not enough. Rather, this Court has been clear: The exception to the Exclusivity Rule applies *only* when an employer or its agents take affirmative acts with an intent to injure the employee. There is no evidence of that here, and not even any allegation of it. To the contrary, Plaintiffs concede that they argue only that Defendants engaged in "reckless conduct." (App. Brief 4 ("The Mareks, on the other hand, contend that the rock fall at the mine—resulting from Hecla's *reckless* conduct....") (emphasis added)) And the MSHA administrative law judge explained that he "[did] not believe that Hecla intentionally risked the lives of miners." (*Id.* at 11)

Plaintiffs' opening brief in this Court proves the point. In support of their position that Defendants' conduct was "wilful or unprovoked physical aggression," Plaintiffs argue (1) that "[n]o engineer review and approval was secured" (App. Brief 28)[9]; (2) "[s]afety review and safety steps

[9] Although it is irrelevant to whether Plaintiffs can satisfy the exception to the Exclusivity Rule, Plaintiffs have no evidence indicating that an engineer did not review and approve the mining plan. Rather, Doug Bayer, who was Mine Superintendent, and is a mine engineer by training and former Chief Mining Engineer at the mine, reviewed the mining plan for the 6150-15-3 stope. (*See supra* at 5) Bayer determined that "I felt the 6150-15-3 stope was stable because of its V shape in a keystone-type orientation and with the horizontal pressures that I am familiar with in the Gold Hunter deposit." (R. 775 (Bayer Decl.)) Further, Bayer explained that if he "had viewed the 6150-15-3 cut as a hazardous mining activity, [he] would have shut down the stope." (*Id.*) The mine's General Manager, John Jordan, who is also a mine engineer by training and a former Chief Mining Engineer at the mine, saw the plan in advance as well and did not believe it was unsafe. (R. 780-82 ("I had no reason to believe that this mining configuration would not be stable." Further, "Based upon the information provided to me I felt that the mining configuration in the 6150-15-3 stope could be mined safely.")) No evidence contradicts Mr. Bayer and Mr. Jordan's testimony. Rather, the evidence discussed in Plaintiffs' brief suggests only that the mine's then-current Chief Mining Engineer, who was subordinate to Mr. Jordan, did not review the mining plan. (App. Brief 28-29) But Plaintiffs submit no evidence that such review was required, or even that it was negligent not to obtain such review. And Plaintiffs omit further testimony from the Chief Mining Engineer that he had in fact reviewed the mining plan. (R. 533, ll. 15:7-13 (Krusemark Dep.) ("Q. Why hadn't you seen the map before when it was posted on the wall? A.

were not undertaken" (*id.* at 30); (3) "Hecla received warning about the removal of the pillars" (*id.* at 31); and (4) "Hecla was significantly sanctioned by MSHA" (*id.* at 36). As an initial matter, these are all alleged failures to act, and so cannot possibly be considered "aggression" under the worker's compensation law. Idaho Code § 72-209(3). Further, they are classic negligence theories, and so run headlong into the holdings of *Kearney* and *DeMoss*, as well as the statute's requirement that the acts be "wilful or unprovoked physical aggression." *Id.* None of Plaintiffs' arguments, not alone and not in conjunction, contains a shred of a suggestion that any Defendant intended to injure Pete or Mike Marek.

The same is true as to Plaintiffs' contention that "Hecla placed the Mareks directly into danger." (App. Brief 34) This argument does not satisfy the exception to the Exclusivity Rule, for, even if supported by the evidence, it is no different than the employer in *Kearney*, who placed the employee in danger with an unsafe lawn mower, or the employer in *DeMoss*, who sent the employees to work with what at first it knew might be asbestos and then did so again even after it knew the material definitively was asbestos. But, regardless, Plaintiffs' argument is not supported by the evidence. The evidence is undisputed that neither of the Mareks were directed to work in the 6150-15-3 stope on the day of their accident. As Dale Stepro, a Hecla supervisor, testified, "At the beginning of the shift, I talked to [the Mareks], let them know that their stope was muckbound and that they would be working on cleaning the spray chamber and also repairing in the intersection right

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Well, I - - you know, it - - to say that I didn't - - hadn't seen it is kind of a - - not a very good description. I'm sure I had seen it. I had walked by it and looked at it."))

there." (R. 791, ll. 24:6-13) No one testified to the contrary. Indeed, Mike Marek confirmed it. (R. 802, ll. 74:10-13 ("Q. Do you recall what you were asked to do by Mr. Stepro that evening? A. Yeah, he told us to work on the spray chamber.")) Thus, Defendants did not *send* the Mareks to the location where the accident occurred; the Mareks *chose* to go there on their own. This alone defeats any suggestion of a willful act or physical aggression.

Plaintiffs do their best to hide this truth. Plaintiffs say "[i]t was alleged, and facts establish, that the Mareks were ordered to work in a dangerous environment." (App. Brief 34) But they then cite only to the complaint—to their unverified allegations. At summary judgment, Plaintiffs cannot rely on allegations to counter Defendants' evidence. *See, e.g., McVicker v. City of Lewiston*, 134 Idaho 34, 37 (2000) ("the opposing party must set forth facts showing that there is a genuine issue for trial and cannot merely rest on the pleadings"). Plaintiffs argue it was "anticipated and foreseen" that the Mareks might go to the stope, and that the Mareks did not do anything wrong by being there. (App. Brief 35) But that is not the point. The point is that Defendants did not send them there—did not take an affirmative act that might satisfy the "wilful or unprovoked physical aggression" exception to the Exclusivity Rule. Therefore, even if sending them into the stope would satisfy the exception to the Exclusivity Rule (which it would not), the evidence is uncontroverted that Defendants did not do so.

2. Idaho's Rule Is In Accord With The Majority Of Other States.

The requirement of intent to injure is the rule not just in Idaho, but widely throughout the country, adopted by both courts and legislatures. Indeed, one leading treatise explains that it is "the almost *unanimous* rule" that "misconduct of the employer short of a conscious and deliberate intent

directed to the purpose of inflicting an injury" does not satisfy the exception to the Exclusivity Rule. 9 *Larson's Workers' Compensation Law* § 103.03.[10] The treatise further explains:

> Even if the alleged conduct goes beyond aggravated negligence, and includes such elements as knowingly permitting a hazardous work condition to exist, knowingly ordering employees to perform an extremely dangerous job, wilfully failing to furnish a safe place to work, fostering a culture of alcohol use at off-premises, after-hours company events, wilfully violating a safety statute, failing to protect employees from crime, refusing to respond to an employee's medical needs and restrictions, or withholding information about worksite hazards, the conduct still falls short of the kind of actual intention to injure that robs the injury of accidental character.

Id. (internal footnotes omitted). In short, to satisfy the exception to the Exclusivity Rule there must be a "deliberate infliction of harm comparable to an intentional left jab to the chin." *Id.*

For instance, in *Van Biene v. ERA Helicopters, Inc.*, 779 P.2d 315 (Alaska 1989), the Alaska Supreme Court reviewed a lawsuit against an employer brought by the families of commercial airline pilots who were killed when their plane crashed. The plaintiffs alleged that the employer required the pilots to fly even though, "[b]y completing this mission, [the pilots] would necessarily violate the Federal Aviation Administration's (FAA) flight time and duty regulations." *Id.* at 316. Further, other pilots reported the employer's "disapproval of pilots' refusals to fly because they were fatigued." *Id.*

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[10] *Larson's* has been cited repeatedly by this Court as authoritative on worker's compensation issues. *See, e.g., Kelly v. Blue Ribbon Linen Supply, Inc.*, 159 Idaho 324, 338 (2015); *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 293 (2014); *Wernecke v. St. Maries Joint Sch. Dist. #401*, 147 Idaho 277, 285-86 (2009). *Larson's* has also been held out as authoritative by other state supreme courts. *See, e.g., Helf v. Chevron U.S.A., Inc.*, 361 P.3d 63, 82 (Utah 2015) (describing *Larson's* as a "leading commentator"); *State Farm Mutual Auto. Ins. v. Wilson*, 199 P.3d 581, 590 (Alaska 2008) (referring to *Larson's* as "a leading text"); *Kawakami v. City and County of Honolulu*, 59 P.3d 920, 924 (Haw. 2002) (referring to *Larson's* as "the leading treatise on worker's compensation"); *Brittingham v. St. Michael's Rectory*, 788 A.2d 519, 523 (Del. 2002) (referring to *Larson's* as "the leading authoritative treatise on the subject").

at 317. The plaintiffs argued they had alleged "an intentional tort of dispatching [the deceased pilots] for a night flight ... without adequate rest or sleep." *Id.*

The court held that the allegations were insufficient to satisfy the exception to the Exclusivity Rule. It explained that "the facts alleged fail to make out an intentional tort. At best, the complaint alleges gross negligence or wilful and knowing violation of FAA regulations." *Van Biene*, 779 P.2d at 318. The court explained further that "[t]he vast majority of courts have held that such allegations do not constitute an intentional act allowing suit outside of the worker's compensation act." *Id.*

In *Moore v. Environmental Construction Corp.*, 147 S.W.3d 13 (Ky. 2004), the Kentucky Supreme Court heard an appeal of a claim by the family of an employee who was killed when a trench he was digging collapsed. After the collapse, the Occupational Health & Safety Administration investigated, and "issued four serious citations" against the employer, including for "failing to provide a ladder to escape the trench; for failure to have a competent person conduct daily inspection of trench; and for not taking adequate safety precautions for a trench over five feet deep." *Id.* at 16 & n.4. The case was tried to a jury, which determined that the employer had caused the employee's death through "deliberate intention." *Id.* at 14.

Despite the jury's verdict, the court held that the evidence did not satisfy the exception to the Exclusivity Rule. The court explained that, to satisfy the exception, "the employer must have determined to injure an employee and used some means appropriate to that end, and there must be specific intent." *Moore*, 147 S.W.3d at 16. "The defendant who acts in the belief or consciousness that the act is causing appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong." *Id.* at 16-17.

As a result, the court held that the employer's "violation of OSHA regulations and acknowledgment of the possible consequences does not amount to a deliberate intention to produce [the employee's] death." *Id.* at 18-19.

Similarly, in *Rafferty v. Hartman Walsh Painting Co.*, 760 A.2d 157 (Del. 2000), the Delaware Supreme Court reviewed a lawsuit brought by the family of an employee of a painting company who had fallen off a bridge he was painting and died. The plaintiff alleged "numerous acts of negligence, in violation of Occupational Safety Health Administration ('OHSA') safety regulations, includ[ing] the failure to provide a training program for employees concerning personal fall arrest systems, failure to provide a safe working environment, and a failure to meet necessary safety requirements in the operation of equipment." *Id.* at 160.

The court held that the allegations were insufficient to satisfy the exception to the Exclusivity Rule. It first explained that "there is a split of authority as to how to judge an employer's conduct and two rules have emerged: the intentional tort doctrine followed by the majority of states and the substantial certainty doctrine that is followed by only a few states." *Rafferty*, 760 A.2d at 159-60. The intentional tort doctrine—which is what Idaho's legislature adopted, as *Kearney* explained—requires "a deliberate intent to bring about injury." *Id.* at 160. The substantial certainty doctrine requires only "that the alleged conduct or condition permitted by the employer caused a situation where the employee would definitely be harmed." *Id.* The plaintiff in *Rafferty* argued that the court should expand the exception to the Exclusivity Rule by adopting the substantial certainty doctrine, but the court held that "we cannot rewrite the statute to apply the substantial certainty doctrine in

Delaware." *Id.* And, regardless, the court held, it would not matter, for the plaintiff's allegations were insufficient "[e]ven if Delaware followed the substantial certainty rule." *Id.*

Finally, in *Griffin v. George's, Inc.*, 589 S.W.2d 24 (Ark. 1979), the Arkansas Supreme Court heard a case brought by an employee of a grain warehouse who had been injured when he was pulled into an unguarded grain auger. *Id.* at 25-26. The employee alleged that the auger had "no grate or any other protective guard" to prevent people from falling into it; that the employer had removed a grate that had been there originally; and that there was usually grain lying on the ground around the auger, such that people coming near it could easily slip and fall into it. *Id.* The employee alleged that the employer's actions were "in direct violation of federal and state statutes and regulations," and that the employer "could have easily been corrected by installation of a protective covering over the opening." *Id.* Finally, the plaintiff alleged that "the employer was aware that this condition was hazardous and dangerous to its employees and recognized the substantial certainty that it would result in injury to an employee," but that, despite this knowledge, it "gave [the employee] a dangerous work assignment which placed him in direct danger of injury by the auger." *Id.*

The court held that the plaintiff's claim did not satisfy the exception to the Exclusivity Rule. The exception, the court explained, applies only to "acts committed with an actual, specific and deliberate intent on the part of the employer to injure the employee." *Griffin*, 589 S.W.2d at 27. Thus, to satisfy the exception, "the complaint must be based upon allegations of an intentional or deliberate act by the employer with a desire to bring about the consequences of the act, and not upon allegations of wilful and wanton conduct by negligent direction to the employee to use a device known by the

employer to be defective or failure to warn the employee of an unsafe condition of which the employer was aware." *Id.*[11]

[11] The four decisions discussed above are representative of a large body of law from other states that is in full accord with this Court's precedent in *Kearney* and *DeMoss*. *Accord* Ariz. Rev. Stat. § 23-1022 (exclusivity rule applies unless the employee was subject to "an act done knowingly and purposely with the direct object of injuring another."); *Torres v. Parkhouse Tire Service, Inc.*, 30 P.3d 57, 60 (Cal. 2001) (holding that "intended injurious conduct" is required to satisfy the exception to the exclusivity rule); *Schwindt v. Hershey Foods Corp.*, 81 P.3d 1144, 1147 (Colo. Ct. App. 2003) ("We agree with the analysis in the Larson's treatise and decline to adopt the 'substantial certainty' approach taken by a minority of the courts."); *Copass v. Illinois Power Co.*, 569 N.E.2d 1211, 1215 (Ill. Ct. App. 1991) ("we hold that plaintiff is required to allege defendants had the specific intent to injure."); *Baker v. Westinghouse Elec. Corp.*, 637 N.E.2d 1271, 1275 (Ind. 1994) ("nothing short of deliberate intent to inflict an injury, or actual knowledge that an injury is certain to occur, will suffice"); *Johnson v. Mountaire Farms*, 503 A.2d 708, 711-12 (Md. 1986) (to satisfy the exception to the Exclusivity Rule requires "an intentional or deliberate act by the employer with a desire to bring about the consequences of the act"); Mich. Comp. Laws § 418.131 (exception to the exclusivity rule satisfied only when "the employer specifically intended an injury"); *Gunderson v. Harrington*, 632 N.W.2d 695, 703 (Minn. 2001) (the employee must identify evidence the employer "consciously and deliberately intended to injure" in order to satisfy the exception to the Exclusivity Rule); *Bowden v. Young*, 120 So.3d 971, 982 (Miss. 2013) ("the plaintiff must show actual intent to injure the employee"); *Light v. J.C. Indus.*, 926 S.W.2d 25, 27 (Mo. Ct. App. 1996) (worker's compensation is the exclusive remedy "so long as the employer does not intentionally injure the employee"); *Harris v. State*, 294 P.3d 382, 386 (Mont. 2013) (an employee must show "an intentional and deliberate act specifically and actually intended to cause injury"); *Conway v. Circus Circus Casinos, Inc.*, 8 P.3d 837, 840 (Nev. 2000) (requiring that the employer "deliberately and specifically intended to injure them"); *Pereira v. St. Joseph's Cemetery*, 54 A.D.3d 835, 836-37 (N.Y. App. Div. 2008) ("the conduct must be engaged in with the desire to bring about the consequences of the act; a mere knowledge and appreciation of a risk is not the same as the intent to cause injury"); N.D. Cent. Code § 65-01-01.1 (employer's action must be taken "with the conscious purpose of inflicting the injury"); *Kaminski v. Metal & Wire Prods.*, 927 N.E.2d 1066, 1079 (Ohio 2010) ("the only way an employee can recover is if the employer acted with intent to cause injury"); 85 Okla. Stat. § 302 (defining "intent" for purposes of the exception to the Exclusivity Rule as the "willful, deliberate, specific intent of the employer to cause such injury"); *Peay v. U.S. Silica Co.*, 437 S.E.2d 64 (S.C. 1993) (enforcing intentional tort doctrine, and refusing to adopt substantial certainty doctrine); *Valencia v. Freeland & Lemm Constr. Co.*, 108 S.W.3d 239, 240 (Tenn. 2003) (requiring "actual intent to injure"); *Vallandigham v. Clover Park Sch. Dist. No. 400*, 109 P.3d 805, 810 (Wash. 2005) ("Even failure to observe safety

Thus, *Kearney* and *DeMoss* are not decisions that put Idaho out of step with other states, but rather join the broad majority rule that actual intent to injure is required in order to satisfy the exception to the Exclusivity Rule.

3. Plaintiffs Mischaracterize Precedent.

Rather than rely on this Court's authoritative precedent interpreting the meaning of the "wilful or unprovoked physical aggression" exception to the Exclusivity Rule, Plaintiffs rely on other decisions that are either not authoritative or do not address the scope of the exception.

First, Plaintiffs quote extensively from Justice Huntley's concurrence in *Kearney*. (App. Brief 19-20) There are a number of problems with this approach. First, and most obvious, Justice Huntley's concurrence was a concurrence. Justice Huntley did not speak for the Court in his opinion, and none of the other justices (all of whom supported the majority opinion) joined his opinion. Second, not only did Justice Huntley's views not garner support from other justices, but his views *conflicted* with the majority opinion. Plaintiffs fail to so much as acknowledge that there is a split in authority among the states as to the exception to the Exclusivity Rule. (*See supra* at 17-18) The vast majority of states follow the intentional tort doctrine, and a minority of states follow the substantial certainty doctrine. (*Id.*) In *Kearney*, the majority opinion held that the Legislature had adopted the intentional tort doctrine through the worker's compensation law, thereby requiring "an intention to injure the employee." *Kearney*, 114 Idaho at 758. Justice Huntley, however, argued that the Court should construe the exception to be satisfied if "injury [was] substantially certain to occur." *Id.* (Huntley, J.,

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laws or procedures does not constitute specific intent to injure, nor does an act that had only substantial certainty of producing injury.").

concurring). In other words, Justice Huntley would have adopted the substantial certainty doctrine. Plaintiffs pretend as though Justice Huntley was just elaborating on the Court's view, but he was not—he was arguing that the Court should interpret the statute as adopting a different doctrine. This Court expressly rejected the substantial certainty doctrine in its decision. *Id.* at 757 ("It is not sufficient to prove that the alleged aggressor committed negligent acts that made it substantially certain that injury would occur."). And, finally, this Court in *DeMoss* made no mention whatsoever of Justice Huntley's concurrence, reaffirming that the law of the State is the majority opinion in *Kearney*.

Second, Plaintiffs contend that *Dominguez v. Evergreen Resources, Inc.*, 142 Idaho 7 (2005) changed the rule set out in *Kearney* and *DeMoss*—and apparently did so without saying it was changing the rule. (App. Brief 20-22) Plaintiffs misconstrue *Dominguez*, which did not address the scope of the exception to the Exclusivity Rule. Rather, it addressed only the question whether an employee can file both a worker's compensation claim *and* a lawsuit. As the Court summarized, "[t]he Employer argues an injury is either (1) an accident sustained in the course of employment, or (2) the result of an intentional tort—but cannot be both." *Dominguez*, 142 Idaho at 11. The employer argued further that, because Mr. Dominguez had filed a worker's compensation claim, it was "inconsistent for Dominguez to continue to claim he was the victim of an intentional tort." *Id.* The Court disagreed, holding that "an employee is not required to forgo the filing of a worker's compensation claim in order to sue his employer for willful or unprovoked physical aggression." *Id.* at 12. Thus, the Court did not address the question already answered by *Kearney* and *DeMoss*, regarding the scope of the exception to the Exclusivity Rule; it answered only the separate question

whether an employee pleads himself out of a tort claim by filing a claim for worker's compensation, which is not at issue here.

Indeed, contrary to Plaintiffs' description of the decision, *Dominguez* explicitly refused to review the merits of the plaintiff's claim.[12] As the Court explained, the plaintiff had secured a default judgment against the employer in the district court. *Dominguez*, 142 Idaho at 7. Consequently, the Court held, review of the judgment against the employer "would be improper." *Id.* at 13. The Court explained that "a judgment by default is a final judgment," and "no appeal lies directly from such a ruling." *Id.* at 14. "If a matter was abandoned by the defaulting party and never properly presented to the trial court, there can be no error by the trial court on a question it was never asked to consider." *Id.* Thus, *Dominguez* did not even purport to say anything about whether the facts alleged there satisfied the exception to the Exclusivity Rule; it refused to review of the merits of the defendant's appeal from the default judgment.[13]

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[12] Although Plaintiffs assert that *Dominguez* applied Justice Huntley's concurrence in *Kearney* (App. Brief 20, 27), *Dominguez* did not so much as cite the concurrence, let alone purport to follow it.

[13] Plaintiffs argue that *Dominguez* must have spoken to whether the facts satisfied the exception to the Exclusivity Rule, because, even in the event of a default judgment, "the deemed-true allegations must still be sufficient to state a legal claim that supports a judgment." (App. Brief 26) But in making this argument, Plaintiffs simply ignore what this Court said—namely, that it would not review the merits of the case. Plaintiffs cannot credibly argue that this Court reached a conclusion that it did not actually reach. Plaintiffs' reliance on *In re Elias*, 302 B.R. 900 (Bankr. D. Idaho 2003) is even further afield. That decision, from a federal bankruptcy court, involved the same litigants as *Dominguez* and addressed the question whether the judgment of the district court in *Dominguez* was dischargeable in the employer's bankruptcy proceeding. *Id.* at 902. In analyzing that question, the court held that the judgment in *Dominguez* had a preclusive effect on the issue of whether the defendants acted with "an extremely harmful state of mind." *Id.* at 912. It said nothing about this Court's decision in *Dominguez*, which had not even been issued yet.

And even if *Dominguez* did redefine the scope of the exception to the Exclusivity Rule (which it did not), the facts at issue there are far removed from the evidence here. In *Dominguez*, the employer ordered an employee to enter and clean a tank the employer knew contained cyanide sludge. *Dominguez*, 142 Idaho at 9. The employee, Mr. Dominguez, alleged—and the allegation was taken as true because the employer defaulted—that the employer "knew it was hazardous to enter the steel tank, but concealed that fact from Dominguez." *Id.* After entering the tank, Mr. Dominguez collapsed and lost consciousness. When firefighters arrived to attempt a rescue, the employer "was allegedly uncooperative with rescue and medical workers, refusing to accurately identify the material in the steel tank and thereby hampering Dominguez's rescue and treatment." *Id.* at 10.

Plaintiffs have submitted no evidence of any similar intentional conduct here. Rather, the district court found that "*Dominguez* is factually distinguishable from the case at bar in that here, it is not alleged that Defendants directed Pete and Mike Marek into a dangerous environment, it has not been alleged that Defendants knew that the environment was hazardous, and it has not been alleged that Defendants hampered or impeded rescue efforts." (R. 969) The district court was correct. There is no evidence that any Defendant (1) directed Pete or Mike Marek to work in the 6150-15-3 stope on the day of the accident—rather, the uncontested record shows the Mareks went to the stope on their own volition (*see supra* at 6, 14); (2) knew the 6150-15-3 stope was unsafe—rather, the defendants who were involved in developing the mining plan testified that they believed based on past experience that the horizontal pressure 50% greater than the vertical pressure would hold the pillar above the

stope[14]; or (3) hampered rescue efforts.[15] As a result, even if *Dominguez* was read to address the scope of the exception to the Exclusivity Rule, Plaintiffs still could not satisfy it.

4. *Kearney* And *DeMoss* Were Correctly Decided.

In addition to being the settled law of this State and representative of the majority view across the United States, *Kearney* and *DeMoss* were rightly decided. The minority view—the substantial certainty test—would not be faithful to the language of Idaho's worker's compensation law, and also would disturb the balance between employees and employers that is inherent in the worker's compensation system.

First, *Kearney* and *DeMoss* were rightly decided because they were true to the statutory language in the worker's compensation law. The exception to the Exclusivity Rule provides that employees are not exempt from the Exclusivity Rule unless their injury was caused by "wilful or

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[14] R. 777 (Bayer Decl.) ("I did not think the 6150-15-3 stope was unsafe when I reviewed the projection map with Bruce Cox, during the weekly Wednesday geology tours including the geology tour of April 13, 2011 when I personally visited the stope or in any of the weekly Thursday meetings when the mining plan was discussed. I did not want to hurt anyone."); R. 782 (Jordan Decl.) ("Based on the information provided to me I felt that the mining configuration in the 6150-15-3 stope could be mined safely. I did not want to hurt anyone."); *see also* R. R. 678, ll. 107:12-15 (Dep. Tr. of T. DeVoe) ("So the Gold Hunter [vein in the mine] is remarkably less seismically active, and that clamping pressure we talk about from horizontal orientation is very effectual and again why I wasn't concerned about the pillar.").

[15] Plaintiffs argue that the *Dominguez* defendant's attempts to impede rescue efforts are irrelevant here, because Pete and Mike Marek suffered injuries during the collapse itself, and the injuries were not exacerbated by the rescue efforts. (App. Brief 23 n.5) This misses the point. If *Dominguez* spoke to the facts at all (which, again, it did not), it could have viewed the defendant's impeding rescue efforts as evidence of his intent to injure the employee. Thus, the absence of any such evidence supporting intent to injure here is a significant factor, regardless of when Pete and Mike Marek suffered any injuries.

unprovoked physical aggression." Idaho Code § 72-209(3). Thus, *Kearney* and *DeMoss* were not starting from first principles as to which rule would be best; they were interpreting the specific language the Legislature used. And the decisions plainly were correct that "wilful or unprovoked physical aggression" indicates intent. As *Kearney* explained, the term "aggression" connotes an affirmative act, such as an "overt hostile attack." *Kearney*, 114 Idaho at 757. It is not possible to commit an overt hostile attack without intent to do so. Thus, *Kearney* and *DeMoss* properly interpreted the language of the worker's compensation law. Further, *Kearney* has now been the law for more than 25 years, and the Legislature has not disturbed it, which is all the more reason to believe the Court accurately understood the Legislature's intent. *See, e.g., Johnson v. Transportation Agency*, 480 U.S. 616, 629 n.7 (1987) ("Congress has not amended the statute to reject our construction, nor have any such amendments even been proposed, and we therefore may assume that our interpretation was correct.").

Second, *Kearney* and *DeMoss* were rightly decided because adopting the substantial certainty test would disrupt one of the primary rationales for the worker's compensation system. As this Court has explained, one reason for the worker's compensation system is "to provide sure and certain relief for injured workmen ... regardless of fault." *Blake v. Starr*, 146 Idaho 847, 851 (2009). However, that is not the only reason: Another purpose of the system is to provide something in return to employers—"to protect industry by providing a limit on liability." *Id.*; *see also* 9 *Larson's Workers' Compensation Law* § 103.03 (explaining that one of the central purposes to the Exclusivity Rule is "to minimize litigation, even litigation of undoubted merit").

Adopting the substantial certainty test would undo the limits on employer liability—including, significantly, the limits on litigation expenses. As a practical matter, in almost any tort case, a plaintiff can allege negligence, gross negligence, or recklessness. The difference between them is not easily resolved without trial. As a result, if recklessness could satisfy the exception to the Exclusivity Rule, the number of lawsuits against employers could rise dramatically, as would the length and cost of each proceeding, because courts would be unable to resolve whether the employer's actions were reckless, or something less, without a trial. Thus, as the Arkansas Supreme Court explained in rejecting the substantial certainty test, "if employers are required not only to provide worker's compensation but also to defend tort actions of employees and to respond in damages for torts, there would be a subversion of the very purpose of the whole workmen's compensation scheme." *Griffin v. George's, Inc.*, 589 S.W.2d 24, 27 (Ark. 1979). For that reason, *Kearney* and *DeMoss* not only correctly implemented the Legislature's intent, but also preserved the compromise on which the worker's compensation system is premised.

5. Plaintiffs Misconstrue The District Court's Explanation Of Which Side Bears The Burden At Summary Judgment.

Plaintiffs argue that the district court erred in holding that Plaintiffs bear the burden of proving that they have satisfied the exception to the Exclusivity Rule. (App. Brief 39-41) But they confuse the ultimate burden on the merits with the burden at summary judgment. The district court got it right.

To begin, the district court's opinion properly articulated who bears the burden at summary judgment: "Once the movant has established a prima facie case that, on the basis of uncontroverted facts, the movant is entitled to judgment, the opposing party must set forth specific facts showing that

there is a genuine issue for trial and cannot merely rest on the pleadings." (R. 979, quoting *McVicker v. City of Lewiston*, 134 Idaho 34, 37 (2000)) The court also explained that "[i]n order to survive a motion for summary judgment, the non-moving party must 'make a showing sufficient to establish the existence of an element essential to that party's case on which that party will be the burden of proof at trial.'" (R. 979-979(a), quoting *Jones v. Starnes*, 150 Idaho 257, 259 (2011)) Both of these principles are black-letter law, and the district court correctly identified them.

Later in the decision, when discussing the merits of the case, the district court held that "the burden is on *Plaintiffs* to prove that their claims fall within the exception to exclusivity." (R. 979(b) (emphasis in original)) This was not a discussion of where the burden falls at summary judgment, but rather which side bears the ultimate burden of proof on the exception to the Exclusivity Rule.

The district court was correct that Plaintiffs bear the burden of satisfying the exception to the Exclusivity Rule. This Court has consistently stated that the employee must prove willful or unprovoked physical aggression in order to satisfy the exception to the Exclusivity Rule. In *Kearney*, the Court discussed what was necessary "[t]o prove aggression." *Kearney*, 114 Idaho at 757. In *DeMoss*, the Court held that the plaintiffs' tort claims were preempted by the Exclusivity Rule because *they* had "not proved any 'wilful or unprovoked physical aggression.'" *DeMoss*, 118 Idaho at 178-79. This reflects how the worker's compensation law itself is structured: The law provides the general rule that "the liability of the employer under this law shall be exclusive and in place of all other liability." Idaho Code § 72-209(1). The law then sets out that the "exemptions from liability shall not apply in any case where the injury or death is proximately caused by the wilful or unprovoked physical aggression of the employer" or its agents. Idaho Code § 72-209(3). The statute does not say

the Exclusivity Rule does not apply unless the employer proves conduct was not willful or unprovoked physical aggression; it provides an exception to the general rule that employees can avail themselves of, which it would be their burden to do.

That Defendants stated as an affirmative defense that their conduct was not "wilful or unprovoked physical aggression" does not change the burden. Defendants often, out of an abundance of caution, state as an affirmative defense that the plaintiff failed to plead or prove an element of the plaintiff's claim, to ensure there is no confusion that they plan to pursue the issue. But restating an element of the plaintiff's claim as an affirmative defense does not change where the burden of proof resides.

Roe v. Albertson's, Inc., 141 Idaho 524 (2005) is not inconsistent with this argument, or with *Kearney* and *DeMoss*. In *Roe*, the question presented was whether the Exclusivity Rule applied at all—the general Exclusivity Rule, not the exception to it. In deciding that question, this Court first described the summary judgment burden, and did so exactly as the district court did in this case: "Albertson's, as the moving party, must show there is no genuine issue as to any material fact that Doe would have been covered by worker's compensation and that it is entitled to judgment as a matter of law." *Id.* at 530. Second, on the merits, the Court held that the employer "must demonstrate Doe suffered an injury covered by workers compensation." *Id.* This ruling did not purport to conflict with what the Court had described in *Kearney* and *DeMoss*, nor did it in fact conflict with them: Where a defendant responds to a tort action by claiming that the Exclusivity Rule applies, it bears the burden of proving that the general rule applies. That is *Roe*. However, where everyone admits that the general

rule applies in the first instance, but the employee argues the claim falls under the exception, that is the employee's burden to establish. That is *Kearney* and *DeMoss*.

It is also the case at bar. Here, all the parties agree that Plaintiffs' claims are subject to worker's compensation—indeed, Plaintiffs long ago filed worker's compensation claims (which have been paid). The only question is whether Plaintiffs can prove the "wilful or unprovoked physical aggression" that would permit them an exception to the Exclusivity Rule, allowing them to sue in addition to filing worker's compensation claims. The district court correctly followed this Court's precedent in holding that Plaintiffs bear the burden on the merits of that argument.

But, regardless, the district court properly implemented the burden at the summary judgment stage. Defendants introduced evidence that they had no intent to injure the Mareks—that is, that the exception to the Exclusivity Rule did not apply.[16] At that point, having established the prima facie case of entitlement to summary judgment, the burden fell to Plaintiffs to set forth specific facts countering Defendants' evidence as to Defendants' intent. Plaintiffs did not. The district court correctly held that "Plaintiffs have failed to put forth evidence that Defendants harbored any ill will toward Mike and/or Pete, nor have Plaintiffs put forth any evidence the Defendants wanted to cause injury or death to Plaintiffs. Therefore, the Court finds that there are no genuine issues of material fact on the issue of whether Idaho Worker's Compensation provides Plaintiffs their exclusive remedy." (R. 984) Plaintiffs disagree that their evidence does not satisfy the exception to the

[16] R. 777 (Decl. Doug Bayer) ("I did not want to hurt anyone."); R. 782 (Decl. John Jordan) ("I did not want to hurt anyone.").

Exclusivity Rule, but that is a dispute about the case law, not a dispute about who bore the burden at summary judgment.

Additionally, who ultimately bears the burden on the merits of whether the exception applies is not presented by this case. That is, this case does not turn on whether the exception is part of Plaintiffs' claim or an affirmative defense. Rather, the district court correctly explained that "[i]n the case at bar, there are no allegations that Defendants acted with any subjective intent to harm Pete and/or Mike Marek, nor are there any allegations that Defendants believed that harm was substantially certain to occur." (R. 981) At that point, it does not matter which side bears the burden of proof. It is clear from either point of view that the exception does not apply.

B. The District Court Correctly Held That There Are No Disputed Issues Of Material Fact Precluding Summary Judgment.

Plaintiffs' second argument on appeal is that the district court wrongly held that there are no disputed issues of material fact that prevented it from ruling on the legal question whether the exception to the Exclusivity Rule applies here. (App. Brief 41-42) This argument merely rehashes Plaintiffs' attempt to reinterpret what satisfies the exception to the Exclusivity Rule. For the reasons explained above, *Kearney* and *DeMoss* are good law, and they require an intent to injure. Because the district court correctly held that there is no evidence of any intent to injure, it was correct that "whether Defendants received warnings that the mining practices were dangerous and whether it was necessary for the chief engineer to approve the mining plan" do not preclude summary judgment. (R. 984)

C. Defendants Baker, Jordan, Hogamier, Moore And Stepro Are Fellow Servants And Immune From Suit.

The worker's compensation law provides that "[t]he exemption from liability given an employer by this section shall also extend to the employer's surety and to all officers, agents, servants and employees of the employer." Idaho Code § 72-209(3). As a result, the district court correctly held that the individual defendants in this case are "immune from liability" under the Exclusivity Rule in the same way that Hecla and its corporate affiliates are. (R. 985)

Plaintiffs' argument that the individual defendants were not entitled to summary judgment is based on the same arguments Plaintiffs made as to Hecla, and is wrong for the same reasons articulated above.

D. The Trial Court Properly Denied Plaintiffs' Motion For Reconsideration.

Plaintiffs' final argument is that the district court improperly denied their motion to reconsider. (App. Brief 43-45) But the motion was improper both procedurally and on the merits. Thus, the district court's denial of it was proper.

1. The District Court Lacked Jurisdiction To Consider Plaintiffs' Motion To Reconsider.

The district court lacked jurisdiction to consider the motion to reconsider for two reasons: First, Plaintiffs failed to timely file a particularized statement of the grounds for the motion until months too late. Idaho Rule of Civil Procedure 11(a)(2)(B) provides that motions to reconsider may not be filed more than fourteen days after entry of final judgment. And Idaho Rule of Civil Procedure 7(b)(1) provides that all motions "shall state with particularity the grounds therefor." The district court entered final judgment on May 5, 2015. (R. 988-89) Plaintiffs filed a document captioned a

motion to reconsider on April 21, 2015. (R. Adden. 14-16) However, that "motion" did not comply with Rule 7(b)(1) because it did not state with particularity its grounds for seeking reconsideration. Plaintiffs did not file a document that stated their grounds for seeking reconsideration until August 4, 2015, well after the fourteen-day period after final judgment within which the rules permitted them to file a motion to reconsider. (R. Adden. 40-48)

The district court correctly held that Plaintiffs had filed their actual motion to reconsider too late. (Tr. 9:2-5 ("So I'm going to find that you're correct, Mr. Ramsden, in your interpretation of the rules...")) However, the court then held that it would hear Plaintiffs' motion anyway. (*Id.* ("...but I'm going to decline your invitation to refuse to hear the plaintiffs' motion.")) That decision was improper. Rule 11(a)(2)(B) does not give courts discretion to forgive untimely motions to reconsider, and Rule 7(b)(1) does not give courts discretion to disregard the requirement that all motions must state their grounds for relief. Thus, the court lacked discretion to disregard what it admitted was Plaintiffs' failure to file timely.

Second, to the extent Plaintiffs' August 2015 motion was considered something other than a motion to reconsider, the district court lacked jurisdiction to consider it because Plaintiffs filed a notice of appeal on May 22, 2015 that divested the district court of jurisdiction for most purposes. (R. 990-95) As this Court has explained, "[o]nce a notice of appeal has been perfected the district court is divested of jurisdiction and the proceedings are stayed during the pendency of the appeal." *H & V Engineering, Inc. v. Idaho State Bd. of Prof. Engineers & Land Surveyors*, 113 Idaho 646, 648 (1987). Idaho Appellate Rule 13(b) contains exceptions to that divestiture, providing specific actions that the district court can take, but Plaintiffs' belated motion would not fall into any of them. Once Plaintiffs

missed their time to file a motion to reconsider, their ability to raise the arguments they wanted to raise was forfeited.

2. The District Court's Ruling Denying Plaintiffs' Motion To Reconsider On The Merits Was Correct.

Plaintiffs argue that the district court's decision denying their motion to reconsider on the merits was erroneous for three reasons: (1) incorrect assignment of the burden of proof on affirmative defenses on cross-motions for summary judgment; (2) the scope of the Mareks' work on April 15, 2011; and (3) the import of the MSHA decision after entry of summary judgment. (App. Brief 43) Notwithstanding the district court's lack of jurisdiction to consider the motion, the court's rejection of Plaintiffs' arguments was correct.

First, as to the burden at summary judgment, the district court's decision was correct for the reasons discussed above. (*See supra* at 27-31) As the district court explained, "Hecla clearly met any initial burden it had pleading the affirmative defense, by presenting a record that shows there is no wilful or unprovoked physical aggression." (Tr. 26:1-3)

Second, the district court correctly ruled that it is irrelevant whether the Mareks were acting within the scope of the work by being in the 6150-15-3 stope on April 15, 2011. The court correctly explained that "that's not the test." (Tr. 26:13-19) Rather, if relevant at all, the question would be "was there express direction to go in there which amounted to wilful or unprovoked physical aggression." (*Id.*) The court correctly held that it is uncontroverted that there was no such direction. (*See supra* at 6, 14) Further, even if Plaintiffs had been directed to the stope, it would not satisfy *Kearney* and *DeMoss*, for the reasons explained above. (*See supra* at 13-14) Plaintiffs' argument to

the contrary relies improperly on the concurrence in *Kearney*, which is not the law. (*See supra* at 20-21)

Third, Plaintiffs argue that the district court failed to consider the decision of an MSHA administrative law judge affirming some of MSHA's earlier citations against Hecla. (App. Brief 43-45) (He vacated other citations.) But again, this argument relies on a reinterpretation of *Kearney* and *DeMoss* that Plaintiffs advance in the main part of their argument and that the district court correctly rejected. The MSHA administrative law judge explicitly found that "I do not believe that Hecla intentionally risked the lives of miners." (App. Brief 11) That he concluded Hecla was reckless does not satisfy the exception to the Exclusivity Rule, as explained above. As the court explained, "I can get negligence, I can get to maybe some sort of aggravated negligence, but I can't get beyond negligence. There just aren't the facts that bring this case within the exception." (Tr. 25:12-15) Further, as the district court correctly held, the MSHA administrative law judge's decision is inadmissible hearsay, and so could not have been properly considered on summary judgment, even if Plaintiffs had submitted it with their earlier briefs. (Tr. 25:12-14 ("I don't believe I'm bound by that person's findings.")); I.R.E. 803(8) (providing that "factual findings resulting from special investigation of a particular complaint, case, or incident" are *not* excepted from the rule against the admission of hearsay); *Kuhn v. Coldwell Banker Landmark, Inc.*, 150 Idaho 240, 251 (2010) (affirming the exclusion of testimony from an investigation by the Idaho Real Estate Commission); *Jeremiah v. Yanke Mach. Shop, Inc.*, 131 Idaho 242, 246 (1998) (affirming exclusion of determination by the Idaho Human Rights Commission).

IV. CONCLUSION

The exception to the Exclusivity Rule requires "wilful or unprovoked physical aggression." "Wilful or unprovoked physical aggression" requires Defendants to have intended to injure Pete or Mike Marek. No evidence of such intent exists on this record and no genuine issue of fact exists. The district court's decision granting summary judgment in favor of Defendants was proper, and should be affirmed.

DATED this 17th day of February, 2016.

RAMSDEN, MARFICE, EALY & HARRIS, LLP

By_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of February, 2016, I served two true and correct copies of the foregoing by the method indicated below, and addressed to the following:

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